***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76-1132

*To be argued by*
JAMES P. LAVIN

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 76-1132**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

JAMES PANEBIANCO, PATSY ANATALA, SNIDER BLANCHARD, RENATO CROCE, CHARLES BROOKS, LAWRENCE IAROSSI, and LEONARD RIZZO,

*Defendants-Appellants*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA



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## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

James Panebianco, Patsy Anatala, Snider Blanchard, Renato Croce, Charles Brooks, Lawrence Iarossi, and Leonard Rizzo appeal from judgments of conviction entered on March 24, 1976, in the United States District Court for the Southern District of New York, after a ten day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 75 Cr. 772, filed August 4, 1975, charged the seven appellants and seven others, Virgil Alessi, Anthony Passero, John D'Amato, Graziano Rizzo a/k/a "Ju-Ju", Joseph Barone, a/k/a "Frankie", Fiore Rizzo and William Huff in 23 counts with various violations of the federal narcotics laws.*

* Indictment 75 Cr. 772 superseded Indictment 75 Cr. 170, filed February 21, 1975.

Count One charged all defendants, with the exception of Virgil Alessi who was named as an unindicted co-conspirator, with conspiracy to violate the federal narcotics laws commencing on January 1, 1968, and continuing to June, 1973, in violation of Title 21, United States Code, Sections 173, 174 and 846.*

Count Four charged Graziano Rizzo and appellant Leonard Rizzo with receiving, concealing and facilitating the transportation and concealment of one kilogram of heroin in April of 1970. Counts Eight and Nine charged Snider Blanchard, a/k/a "Jap," with receiving, concealing and facilitating the transportation and concealment of two kilograms of heroin from October to December, 1970 and two kilograms of heroin from January to April, 1971. James Panebianco, a/k/a "Jimmy Feets", was charged in Count Ten with receiving, concealing and facilitating the transportation and concealment of one-half kilogram of heroin in February or March, 1971. In addition, in Counts Two, Three, Five, Six and Seven, other defendants who are not appellants were charged with receiving and transporting similar amounts of heroin. Counts Two through Ten were alleged in violation of the "old" narcotics law, Title 21, United States Code, Sections 173 and 174.

Count Eleven charged Graziano Rizzo and Leonard Rizzo with distributing and possessing with the intent to distribute one-half kilogram of heroin in July, 1971. Count Twelve charged Panebianco with distributing and possessing with intent to distribute one-half kilogram of heroin in the summer of 1971. Count Thirteen charged Charles Brooks with distributing and possessing with the intent to distribute one-half kilogram of heroin in the summer of 1971. Patsy Anatala and William Huff were charged in Count Fourteen with

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* In addition to Virgil Alessi, the unindicted co-conspirators named in the indictment were Vincent Papa, Anthony Loria, Anthony Manfredonia, Frank Pugiliese, Frank D'Amato, Mary Mobley, Charles Simmons, Richard Diamond and Alvin Clark.

distributing and possessing with the intent to distribute six kilograms of heroin during June through December, 1971. Snider Blanchard was charged in Count Twenty with distributing and possessing with the intent to distribute one-half kilogram of heroin in the summer of 1972. Patsy Anatala, a/k/a "Bart", was charged in Count Twenty-one with distributing and possessing with the intent to distribute 242 grams of heroin on November 25, 1972. Counts Twenty-two and Twenty-three charged Graziano Rizzo and the appellant Renato Croce with distributing and possessing with the intent to distribute 383 grams of heroin on January 16, 1973 and one-half kilogram of heroin on February 6, 1973. Other defendants, not parties to this appeal, were charged in similar offenses in Counts Fifteen through Nineteen. Counts Eleven through twenty-three charged violations of the "new" narcotics law, Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial commenced on January 21, 1976, as to seven defendants. On February 6, 1976, the jury found all seven defendants guilty on all counts in which they were named.*

On March 24, 1976, Judge Bonsal imposed the following sentences:

| *Defendant* | *Counts* | *Term of Imprisonment* | *Special Parole Term* |
|---|---|---|---|
| James Panebianco | 1, 10, 12 | 10 years | 6 years |
| Patsy Anatala | 1, 14, 21 | 3 years | 3 years |
| Snider Blanchard | 1, 8, 9, 20 | 10 years | 6 years |
| Renato Croce | 1, 22, 23 | 10 years | 6 years |
| Charles Brooks | 1, 13 | 3 years | 3 years |
| Lawrence Iarossi | 1 | 10 years | 6 years |
| Leonard Rizzo | 1, 4, 11 | 5 years | 3 years |

* Graziano Rizzo, Joseph Barone and John D'Amato pled guilty prior to trial and the cases against Alessi, Huff and Fiore Rizzo were severed. Passero was and remains a fugitive. On June 17, 1976, Fiore Rizzo was convicted on Count Nineteen after a trial before Judge Bonsal and a jury.

The sentences on all counts were to be served concurrently. Iarossi is presently serving a sentence on other charges and the remaining six defendants are at liberty pending this appeal.*

## Statement of Facts

### A. The Government's Case

#### 1. Summary.

The principal Government witness was Anthony Manfredonia, an admitted participant in many of the transaction underlying this indictment who pleaded guilty prior to trial to the superseded indictment, 75 Cr. 170, charging him with violations of the federal narcotics laws. Manfredonia's testimony was corroborated by that of Mary Mobley and Thomas Murray, also confessed participants, and also by the testimony of narcotics agents who conducted undercover and surveillance investigation of the conspiracy.

The Government's proof demonstrated the existence and operation of an organization that distributed heroin from and in New York City beginning in 1966 and continuing to 1973. The organization functioned on several levels. Vincent Papa, aided by Alessi and Passero, was the principal source of supply; on occasions when he was temporarily unable to sell heroin, James Panebianco was an alternate source. Lawrence Iarossi, Renato Croce and Leonard Rizzo, together with others named in the indictment, were middlemen, purchasing heroin from Papa and Panebianco and rendering assistance to one another. Anatala, Brooks, Blanchard and others were customers for the heroin.

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* The ten year sentence Iarossi received is to run concurrently with a fifteen year sentence imposed on him in 1970 by the Honorable Harold R. Tyler, then United States District Judge, after Iarossi's conviction for violation of the federal narcotics laws in 1969.

## 2. Manfredonia and Iarossi begin to deal in heroin.

Anthony Manfredonia began dealing in heroin in 1966 with Vito Panzerino. He and Panzerino had one customer for heroin, the appellant Snider Blanchard, a/k/a "Jap". Manfredonia's association with Panzerino lasted only a few months. Thereafter, he and Butch Mamone sold heroin to Blanchard for a period of approximately four months. Mamone obtained this heroin from co-conspirator Vincent Papa (Tr. 375-385).*

In early 1967, Manfredonia was approached by the appellant Lawrence Iarossi, a/k/a "Big Lou", at Manfredonia's apartment in the Bronx. Manfredonia told Iarossi about Blanchard and the price he and Mamone were paying for heroin. Iarossi said he could obtain heroin more cheaply, and subsequently supplied a half kilogram to Manfredonia, who resold it to Blanchard in the Bronx. Manfredonia and Iarossi continued to deal in heroin on a permanent basis from 1967 to 1970 (Tr. 385-390).

During their association, both Manfredonia and Iarossi would regularly go to the Astoria Colts Social Club on Ditmars Boulevard in Queens approximately twice a month. At the club, they would order heroin in one-half and one-quarter kilogram quantities from either Vincent Papa or Papa's associate, Jack Locorriere.** The heroin,

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* "Tr." refers to the trial transcript; "GX" to government exhibits; "App." and "Br." to the joint appendix and brief of the specified defendant.

** During one of Manfredonia's visits in 1968 to order heroin from Vincent Papa at the Astoria Colts Social Club, the defendant Graziano Rizzo, a/k/a "Ju-Ju," entered the club and spoke to Papa. Graziano left in about an hour and Papa told Iarossi and Manfredonia that Graziano owed him money for "goods" that he had given to Graziano. (Tr. 434-436).

generally pure, was then delivered to them in Queens or to Manfredonia's or Iarossi's Bronx apartments by Locorriere or Papa and, on one occasion, by defendant Anthony Passero. Iarossi and Manfredonia would resell the heroin to their customers, the most regular of whom was the appellant Blanchard. Blanchard would come to New York to pick up the heroin and on other occasions Iarossi and Manfredonia would deliver the heroin to Blanchard's Baltimore residence or to a laundromat Blanchard owned in that city.* In late 1967, Blanchard became reluctant to make the trip to New York so Manfredonia arranged to have co-conspirator Anthony Simonetti make the deliveries to Blanchard in Baltimore approximately every two weeks. Simonetti would return from each delivery with $7-8,000 for a quarter of a kilogram and $13-14,000 for a half kilogram. With the proceeds, Manfredonia and Iarossi would pay Papa $9-10,000 for a half kilogram and divide the profit, after paying Simonetti (Tr. 387-409).

In 1968, Manfredonia was introduced to the defendant James Panebianco, a/k/a "Jimmy Feets," by Iarossi. In 1969, Panebianco brought a sample of heroin to the basement of Iarossi's Bronx house for testing. Iarossi and Manfredonia tested the heroin and found it to be pure. Manfredonia mentioned to Panebianco that Blanchard was in New York and had contacted him about a problem some of Blanchard's friends were having in obtaining heroin. Panebianco asked Manfredonia and Iarossi if they would take one-half kilogram of heroin

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* Drug Enforcement Administration Special Agent Michael Agnese testified that from 1968 to the present he was assigned to the DEA's Baltimore office and he on numerous occasions observed Blanchard at the Fulton Laundromat and at Blanchard's home at 5803 Greenspring Avenue, both locations in Baltimore. (Tr. 1145-1150).

from him and they agreed. Pursuant to an agreement with Panebianco, Manfredonia met Blanchard in mid-town Manhattan where he happened to be the following day. Blanchard requested that Manfredonia wait until he met with his customers, but when he returned he told Manfredonia that his friends had already obtained heroin and that he would see Manfredonia in a week or so. Manfredonia returned to Iarossi's house and told Panebianco and Iarossi that Blanchard's friends had obtained heroin elsewhere and Panebianco left the house with the half kilogram of heroin (Tr. 410-415).

Also in 1968, prior to the aborted Panebianco sale, Iarossi and Manfredonia began to expand their operation to include a new heroin customer in Pittsburgh, Alvin Clark. During 1968 Iarossi and Manfredonia traveled to Pittsburgh on a regular basis for Iarossi to deliver heroin to Clark. After returning to New York, they would split the profits after paying Papa for the heroin. During these early deliveries Manfredonia was not introduced to Clark, but remained in the background; however, in early 1969, Iarossi introduced Manfredonia as "Ralphie" to Clark, at Clark's Pittsburgh restaurant. Clark was instructed to contact Manfredonia if he was unable to reach Iarossi (Tr. 415-419).

After this initial meeting, Manfredonia in 1969 made numerous heroin deliveries directly to Clark both in New York and Pittsburgh. He also made deliveries to Mary Mobley, Clark's female courier (Tr. 409-421). On one occasion during 1969, both Manfredonia and Iarossi were looking for someone to make a delivery to Pittsburgh. Manfredonia at first attempted to get Simonetti, but Iarossi said that he, at the request of Papa, had arranged for the defendant Virgil Alessi to go instead. Iarossi explained that Papa had asked him

to let Alessi make a delivery because Alessi needed the money (Tr. 421-423).*

Manfredonia's testimony about his dealings in Pittsburgh were substantially corroborated by Mary Mobley. She described in detail her participation in various transfers of heroin among Clark, Manfredonia and Iarossi in which she acted as a courier (Tr. 28-63). During many of her trips between New York and Pittsburgh she would remove some of the heroin she was delivering and either consume it herself or sell it.

Her deliveries of heroin from Manfredonia and Iarossi to Clark continued from the end of 1968 to the middle of 1970 at intervals of approximately every two weeks to a month (Tr. 52-63).

### 3. Graziano Rizzo, Leonard Rizzo and Renato Croce commence supplying heroin to Clark and Mobley.

In approximately January, 1970, Iarossi told Manfredonia that he was going to have Graziano Rizzo ("Ju Ju") supply Alvin Clark because he owed Graziano Rizzo money (Tr. 1328-1329). In or about June, 1970, Clark introduced Mary Mobley to Graziano Rizzo at Clark's Pittsburgh Restaurant, the Dog and Burger Village, and told her that Graziano Rizzo would be meeting her in New York. About a week later later Mobley flew to New York and paid Graziano Rizzo, who gave her a package

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* During the early part of 1969, Iarossi complained that Alessi, who was to take another half kilogram of heroin to Pittsburgh, did not show up. (Tr. 424-425).

of heroin. About two weeks later, in the Dog and Burger Village, Clark introduced Mobley to Leonard Rizzo, Graziano Rizzo's brother. Mobley argued with Leonard over a remark he made to her and she later observed him open an attache case containing packages similar to those containing heroin that she had picked up in New York. Subsequent to this meeting, Mobley made numerous trips to New York to receive packages of heroin from either Leonard Rizzo or Graziano Rizzo, or sometimes both together (Tr. 298-306). Again, as was her custom, Mobley would remove some of the heroin before giving the balance to Clark. On one of those occasions in late 1970 or early 1971, at a New York airport, Leonard Rizzo introduced Mobley to the defendant Renato Croce, a/k/a "Rene". Mobley paid Leonard Rizzo, and Croce handed her the package of heroin. Mobley's final pickup from Leonard and Graziano Rizzo took place in or about August, 1971 when the brothers gave her a package of heroin. This package she did not deliver to Clark but rather kept herself.* (Tr. 64-70, 181-192, 2966-297, 336-338).

In or about February or March, 1970, Iarossi and Manfredonia delivered a half kilogram of heroin to Blanchard in his Baltimore laundromat. Blanchard, after testing the heroin, paid $13-14,000 for it (Tr. 428-430).

### 4. Joseph Barone enters the conspiracy.

Sometime after the delivery to Blanchard, Manfredonia temporarily ceased dealing in narcotics. In September or October of that year, however, he was introduced to Joseph Barone by a mutual acquaintance at Manfredonia's house on Stadium Avenue in the Bronx.

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* Mobley used some of the heroin to plant on Clark's premises before alerting the police, who arrested Clark. (Tr. 188-189).

Barone stated that he had a heroin customer, one G. T. Watson, but that he had difficulty getting supplies and asked if Manfredonia had a source for heroin. Manfredonia said that he had, and shortly afterwards he went to the Astoria Colts Social Club to see Vincent Papa. Papa, during Manfredonia's brief hiatus from the narcotics business, had transferred his operations to Scot's Pub, a bar in Queens. When he arrived at the Pub, Manfredonia met Papa and the defendants Virgil Alessi and Anthony Passero and ordered a half or quarter kilogram of heroin. He and Barone then followed Alessi and Passero to Northern Boulevard where they were instructed to wait. Thirty minutes later, Alessi and Passero returned and Manfredonia went over to their car and received a half kilogram. He and Barone then returned to the Bronx where they diluted and resold the heroin to Clark and Barone's customer, G. T. Watson, and also to Snider Blanchard.

Manfredonia and Barone made two or three similar trips during the winter of 1970. On each occasion, Manfredonia would order the heroin from Papa, Alessi or Passero and go to a prearranged location where the heroin would be delivered to him. Around December, 1970, Alessi delivered to Manfredonia a half kilogram of heroin wrapped as a Christmas present (Tr. 430-446). During 1971 Manfredonia and Barone would go to Scot's Pub approximately twice a month and order the quantity of heroin they needed from Papa or his associates, Alessi, Passero or Frank D'Amato and await delivery by one of them or Frank D'Amato's brother, John, who made the bulk of the deliveries. Manfredonia and Barone would take the heroin back to the Bronx and resell it to Charles

Brooks, William Huff, Snider Blanchard, G. T. Watson, or Alvin Clark (Tr. 443-444).*

In 1971, Clark wanted someone to make the deliveries to him and as a result Barone contacted Thomas Murray, a co-conspirator who pleaded guilty to the superceded indictment, 75 Cr. 170, and testified for the Government. After being introduced to Manfredonia, Murray began making deliveries to the customers. He testified that Barone accompanied him on his first trip and at the airport in Pittsburgh Barone introduced Murray to Clark. Barone later gave Murray a package which Murray placed in Clark's car which was parked nearby. Murray also described other actual and attempted narcotics deliveries between Manfredonia and Clark (Tr. 675-693).

In early 1971, when the Queens group was temporarily unable to supply Manfredonia and Barone with heroin, Manfredonia went to a club on Tremont Avenue in the Bronx looking for Graziano Rizzo, but the only person in the club was the appellant Leonard Rizzo. Manfredonia told Leonard that he needed a quarter kilogram of heroin and asked Leonard where "Ju-Ju" was. Leonard responded that he could take care of it. Later that day Manfredonia and Barone met Leonard Rizzo on Tremont Avenue in the Bronx where he gave them a quarter-kilogram of heroin for which they paid $5,000 (Tr. 468).

In February or March, 1971, Manfredonia and Barone were again unable to obtain heroin from the Queens group. Manfredonia went to the defendant Pane-

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* Numerous telephone calls to Alvin Clark in Pittsburgh, G. T. Watson in Elizabeth, New Jersey and to Blanchard's Baltimore laundromat were reflected on the telephone toll records of Joseph Barone and Barone's girlfriend, Connie Ullman, during the fall of 1971 to the spring of 1972. (Tr. 1150-1172; GX's 18, 19).

bianco's house on Quincy Avenue in the Bronx and obtained a quarter kilogram from Panebianco, which he and Barone resold to Clark and G. T. Watson (Tr. 454-456).

In the summer of 1971, Barone told Manfredonia that the defendant Charles Brooks owed him $58,000 for two kilograms of heroin that Barone had given Brooks. Barone and Manfredonia went to Brook's business, the Melody Wine and Liquor store on 116th Street in New York City. In an apartment over the store Brooks paid Barone $28,000 of the $58,000 owed on the two kilograms. He then asked Barone and Manfredonia if they could get him a half kilogram of heroin. A few days later Barone and Manfredonia returned with the half kilogram for which Brooks paid them $13,000 in cash (Tr. 451-454, 624-626, 663-670).*

### 5. The seizure of Papa's heroin stash in Queens.

On June 7, 1971, three New York City Police officers, Sergeant Fortunato DeLuca, Patrolmen Charles Friscina and William O'Rourke began surveillance of activities in the area of Scot's Pub in Queens and of an apartment house at 46-01 39th Avenue. On several occasions they saw Frank and John D'Amato meet and, following which, John would make regular visits at 11:00 p.m. to 46-01 39th Avenue and exit the building carrying various sorts of packages.

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* Sometime after he met Manfredonia, Murray accompanied Barone on two trips to Bronx locations—one on Gunhill Road and the other on Webster Avenue—where Barone made deliveries to Brooks. (Tr. 695-699, 734-741).

On another occasion during 1972, Murray was requested to follow Barone and Manfredonia to a Bronx street where Murray observed them in conversation with Virgil Alessi. Barone, when asked by Murray, stated that the conversation had been about "business". (Tr. 713-717; GX 10).

On the evening of July 8, 1971, the officers awaited John D'Amato's customarily punctual 11:00 p.m. arrival at 46-01 39th Avenue. Unknown to the officers, Manfredonia and Barone selected the same evening to drive to Scot's Pub to place an order for heroin. When they arrived, Manfredonia gave Passero and Frank D'Amato $10,000 for a half kilogram. Frank then instructed Manfredonia to wait for his brother, who would be delivering the heroin. Shortly thereafter, John D'Amato arrived at the building at 46-01 39th Avenue and was observed by Officer Friscina to enter apartment 106. The officers then took up positions on either side of the door to the apartment and arrested John D'Amato as he came out of the apartment carrying a brown paper bag which contained approximately one-half kilogram of heroin. Inside the apartment there were an additional 34 pounds of heroin, and testing, packaging and diluting materials as well as the occupants of the apartment, Sandra and Louis LaSerra (Tr. 786-791).* During this time, Manfredonia and Barone waited for John D'Amato. Frank D'Amato drove by and asked why they were still there. Manfredonia replied that John had not yet delivered the heroin. Frank told them that he would be right back and he made a U-turn on Northern Boulevard and drove two or three blocks before turning off Northern Boulevard and out of Manfredonia's view (Tr. 457).

When he disappeared from Manfredonia's view, Frank D'Amato drove to the apartment where, unknown to him, his brother and the LaSerras were under arrest. At the building, Frank called apartment 106 over the intercom and asked for his brother. Louis LaSerra, as instructed

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* The actual heroin had been officially destroyed. Photographs of the seized narcotics and paraphernalia were shown to the jury. (GX's 11-11a; 12-12(b); 13-13(e)).

by Police Officer Friscina, answered and asked Frank to come up, Frank refused and instead told LaSerra to come downstairs which LaSerra, followed by Police Officer Friscina, did. When Frank D'Amato saw Officer Friscina he fled but was overtaken and placed under arrest (Tr. 793-796, 826-832).

Manfredonia and Barone in the meantime waited another 45 minutes and then drove in the direction Frank D'Amato had gone. After a short drive they observed Frank D'Amato's car double-parked in front of an apartment house with police cars in the area. Manfredonia and Barone returned to Scot's Pub and Manfredonia telephoned Passero and informed him of what had happened. Passero the next day returned the $10,000 and told Manfredonia that Frank and John D'Amato had been arrested in the "plant" with a quantity of heroin (Tr. 458).*

Unable to get heroin in Queens because of the seizure, Manfredonia went to the defendant Panebianco's house on Quincy Avenue in the Bronx and told him that John and Frank D'Amato had been arrested in Queens and that he couldn't get any heroin. Manfredonia asked Panebianco for a quarter of a kilogram but Panebianco said he only had "halves" and that Manfredonia could take a half kilogram and pay for it later. Manfredonia took a half kilogram, diluted it with mannite, and sold a quarter kilogram to Alvin Clark. A day or so later, Graziano Rizzo came to Manfredonia's house and claimed

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* Sergeant Thomas Houston testified that while on surveillance duties during February to June 1971 he entered Scot's Pub on approximately twenty occasions and on numerous of those occasions he had observed Alessi in conversation with Frank and John D'Amato. (Tr. 837-845).

that he, too, was having trouble getting heroin and asked if Manfredonia could help him out. Manfredonia stated that he had just obtained some from "Jimmy Feets" and had a quarter kilogram left. Graziano Rizzo agreed to take it. Manfredonia quoted Rizzo a price higher than he, Manfredonia, had agreed to pay Panebianco and on the following day Panebianco came to Manfredonia's house and gave him the extra money that Manfredonia had charged Graziano Rizzo (Tr. 458-461).

In the late summer or early fall of 1971, the appellant Anatala told Manfredonia that he was trying to do business with William Huff but needed a heroin source. Manfredonia agreed to supply the heroin and during the fall of 1971 he, Barone and Anatala delivered heroin to Huff in Manhattan on approximately six to eight occasions. On each occasion, Manfredonia would give the heroin to Anatala and then they would drive down to Huff's apartment in Manhattan where Anatala would deliver the heroin to Huff and return with the payment, which would be divided among Anatala, Barone and Manfredonia. On other occasions Anatala would make the deliveries by himself. Two or three kilograms of heroin were delivered to Huff in this manner during the fall of 1971 (Tr. 462-466).

Sometime in 1972, Barone called Murray and told him to come to Manfredonia's house on Stadium Avenue in the Bronx. When Murray arrived, Barone and Anatala were waiting and the three proceeded towards Manfredonia's house. As they did so, they encountered Graziano Rizzo, who commented to Barone that Murray looked like a cop. Barone assured Graziano that Murray was his "man". The four, Barone, Murray, Graziano Rizzo and Anatala, entered Manfredonia's house where Manfredonia asked Graziano Rizzo for the package. Graziano Rizzo removed a package and placed it

on the coffee table. Barone and Manfredonia then combined their money and gave it to Graziano, who counted it and stated he needed an additional $500. An argument ensued in which Graziano Rizzo told Manfredonia and Barone that the price had gone up and that if they didn't like it they could talk to his uncle about it. Murray then left the house and observed Barone and Graziano Rizzo walking up the street (Tr. 699-702).

### 6. The undercover negotiations.

During 1972, Murray also delivered heroin for Manfredonia and Barone to G. T. Watson. By this time, Watson had become an informant for the D.E.A. and was frequently accompanied by Special Agent Arthur Carter, who posed as Watson's narcotics partner. On March 20, 1972, Watson was provided with $4500 by Agent Carter and met with Barone and Murray. Later that day, Murray returned $4000 to Agent Carter claiming that they couldn't transact any business because "the heat was on" (Tr. 1017-1023).

On March 25, 1972, Watson again met with Barone in the Bronx. After that meeting, Agent Carter and the informant left the informant's car parked near Pelham Parkway in the Bronx with the keys over the sun visor. Both of them then left the area and approximately fifteen minutes later surveillance agents observed Barone and another unidentified man circling the block where Watson's car was parked. Barone and the man drove off and approximately one hour later a station wagon briefly double parked next to the informants car. At about 11:00 p.m. that night Watson and Agent Carter returned to the parked car where Agent Carter searched under the front seat and found a brown paper

bag containing approximately 109 grams of 73% pure heroin (Tr. 1023-1028; 1197-1201; GX 22).

On April 12, 1972, Agent Carter again met with Watson and gave him $9000 in Government funds. The two then drove to the riding stables on Pelham Parkway where the informant, Watson, met with Barone and then returned to Agent Carter's car. As on March 25, 1972, Watson and Agent Carter left their car parked, with the keys over the visor and later found a package containing approximately one-quarter kilogram of heroin left in the car (Tr. 1035-1044, 1201-1206; GX 23, 23c).

On April 25, 1972, Watson and Agent Carter returned to the riding stables, where Watson met with Fiore Rizzo.* On the following day Agent Carter gave Watson $9,000 and again they went to the riding stables where the informant met with Fiore Rizzo. That night Watson and Agent Carter drove to the vicinity of Parkchester General Hospital in the Bronx where Fiore Rizzo delivered a package containing approximately one-quarter of a kilogram of heroin to Watson and Agent Carter (Tr. 1046-1054; GX 24). Two days later on April 28, 1972, Watson met with Anthony Manfredonia in the Bronx (Tr. 1055).

On two occasions during the summer of 1972, in July or August and again about two or three weeks later, the defendant Blanchard flew in from Baltimore and was met by Manfredonia who then drove Blanchard to Pennsylvania Station on 34th Street in New York City. In the car Manfredonia sold Blanchard a quarter

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* Fiore Rizzo, the uncle of Leonard and Graziano Rizzo, was severed prior to trial. He was subsequently convicted on June 17, 1976.

of a kilogram on the first trip and a half kilogram on the second trip. Blanchard later called Manfredonia and complained about the quality of the heroin picked up on the second trip (Tr. 466-473).

On November 21, 1972, Agent Carter, after giving Watson $10,000 in Government funds, observed him meet with Barone and Anatala on Fordham and Webster Avenue in the Bronx. After the meeting, Watson no longer had the $10,000. On November 24, 1972, Watson and Agent Carter drove to Zerega Avenue in the Bronx where Watson spoke with Anatala. He then returned to his car and, followed by Agent Carter, followed Anatala to Sampson Avenue where Anatala parked his blue station wagon by a garage. Anatala and Watson got out of their cars and talked. Agent Carter observed Anatala during the conversation pointing toward the garage. Inside the garage Agent Carter later located a brown paper bag which upon subsequent examination contained approximately one-quarter of a kilogram of heroin (T. 1056-1068; GX 25).

### 7. The Graziano Rizzo-Croce seizure.

During the late part of 1972 and continuing into early 1973, agents and city police officers assigned to the New York Drug Enforcement Task Force conducted a narcotics investigation involving two individuals in the Bronx, Colin Carroll and Richard Navedo. Task Force undercover agents made a number of heroin purchases during November and December of 1972 from Carroll, who was in turn obtaining his heroin from co-conspirator Richard Navedo. Surveillance agents were watching Navedo's house at 1013 East 222nd Street on the evening of January 16, 1973. At about 10:30 a blue oldsmobile pulled

up and two males, later identified as the defendants Renato Croce and Graziano Rizzo, left the car and went to the trunk. Croce opened the trunk and removed a manila envelope which he put under his arm. He and Graziano Rizzo then went into Navedo's house and stayed about ten minutes before coming back out and entering their car. Detective Drucker attempted to follow them but lost them when the driver ran a red light and made a U-turn and sped off (Tr. 868-871).

The following day, January 17, 1973, Detective Ralph Nieves, acting in an undercover capacity, met with Carroll and negotiated for the purchase of heroin. The two then went to Navedo's gas station where Carroll left with Navedo and returned shortly with an eighth of a kilogram of heroin which he sold to Detective Nieves. On the night of January 31, 1976, the defendant Croce and Graziano Rizzo were again seen entering Navedo's house where they stayed for ten minutes (Tr. 871-872).

On February 6, 1973, Detective Nieves returned to Navedo's gas station to purchase another quantity of heroin. When he arrived, Croce and Graziano Rizzo were talking with Navedo inside the gas station. Carroll then entered Detective Nieves' car and the two of them discussed the heroin transaction. Carroll eventually agreed to accept $2,000 as down payment with the $7,500 balance to be paid on the delivery of the heroin. Carroll took the $2,000 and entered the gas station. He then returned, and told Nieves that Navedo did not want to do business because the "Feds" were in the area. During the conversation, Nieves observed Croce and Graziano Rizzo entering their car and driving away. Detective Nieves demanded all of his money back and Carroll returned to the gas station to get the $1,000 he had left with Navedo. Carroll again returned and told Detective Nieves that Navedo was now willing

to go through with the transaction. With that Carroll and Navedo drove off. When they returned, Carroll came over to Detective Nieves' car and handed over a manila envelope containing a quarter kilogram of heroin encased in plastic. At that point, Carroll and Navedo were arrested and taken to Navedo's house (Tr. 849-859, 873). Navedo's address book, taken from him at the time of his arrest and photocopied, contained an entry under January 1973 section that read: "Jim Banchard (The Jap) Somewhere on Green St., Balt., Md." (Tr. 878-880; GX 16A). The appellant Blanchard's nickname was "Jap" and he lived on Greenspring Avenue in Baltimore, Maryland (Tr. 382, 1147). While Special Agent Robert Benson and another arresting officer were leaving Navedo's house, they observed the blue Oldsmobile with two passengers driving slowly by the house. Agent Benson and other officers subsequently, placed the driver of the car, the defendant Graziano Rizzo, under arrest and arrested Croce, who was found making a call from a telephone booth. Croce and Rizzo were transported back to Navedo's house and there explained their presence in the area by stating they were clean and were looking for girls. During a subsequent search of the car, Agent Benson found a manila envelope secreted under the passenger side of the front seat. The manila envelope contained two clear plastic bags containing approximately a pound of heroin (Tr. 874-878, 913-924; GX 15).*

Sometime in 1974, Murray received a phone call from Barone who told Murray that he was going to meet Patsy Anatala's "man." Barone, Murray and Anatala drove down to Huff's apartment in Manhattan where Barone

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*GX 15 was a photograph of the heroin seized from the car. The actual heroin, as well as the other heroin sold to the undercover agents, had been officially destroyed prior to trial.

received a sum of money from Huff. Then Barone, Murray and Anatala went to an apartment in the Bronx and obtained a quantity of heroin which Murray delivered to Huff, who had waited downstairs (Tr. 709-712).*

## B. The Defense Case.

### 1. Leonard Rizzo.

The defendant Leonard Rizzo called his wife, Marianne, who testified that she had been working as a waitress for fourteen years and that her husband sometimes worked as a waiter (Tr. 1357-1363).

Leonard Rizzo also testified on his own behalf about his military service and employment history. Rizzo denied knowing Mary Mobley, but he recalled that in the summer of 1971 while he was living on Middletown Road he and his brother, who lived four blocks away, were on their way to a ballgame in Queens. They stopped off on the way at a Howard Johnson's on Queens Boulevard where his brother introduced him to a young black couple. Leonard and the female had a cup of coffee while his brother and the black male had a conversation in another part of the restaurant after which he and his brother continued on to the ball park (Tr. 1387-1391). Leonard Rizzo also testified that his brother owned a beauty salon in partnership with the defendant Croce whom Leonard saw at his brother's house on a few occasions.

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* Shortly before his arrest in 1975, Murray was sent by Barone to Brook's bar in Yonkers to see if Brooks wanted heroin. Brooks said yes, but when Murray mentioned the price, Brooks declined, saying he could get it cheaper elsewhere. (Tr. 698-699).

Leonard Rizzo thought he might have also seen Manfredonia at his brother's house but was not sure. In 1975, his brother "Ju Ju" told him at the Federal Detention Center in West Street that he was in the drug business; Rizzo claimed that was the first time he was aware that his brother was dealing in narcotics (Tr. 1392-1396).

On cross-examination, Leonard stated that he lived at various addresses in the Bronx after his return from California in 1970 up to June or July of 1972, when he moved to Toms River, New Jersey (Tr. 1399-1400). Leonard also admitted going to social clubs in the Bronx with his brother, one of which was on Tremont Avenue. He stated that he was not aware of his brother's 1973 narcotics arrest with Croce in the Bronx until his brother told him about it in West Street (Tr. 1401-1415).

### 2. Charles Brooks.

The defendant Charles Brooks testified that he was a licensed beautician and had also owned a bar called Alexander's Cocktail Lounge in Mount Vernon from 1972-1975. He had also owned the Melody Wine and Liquor store at 120 West 116th Street in New York City from 1970 to 1973 and he had an apartment over the liquor store.

Brooks denied ever meeting Manfredonia but stated that G. T. Watson had introduced him to Barone, whom he knew as "Frankie," and that he had borrowed $3,000 from Barone.* Brooks denied dealing in heroin with

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* Brook's toll records for 1972 reflected calls to G. T. Watson, the government informant. (GX 20).

Barone or anyone else but admitted that Barone did come to his apartment over the liquor store in the summer of 1971 to collect delinquent payments on the $3,000 loan. Brooks also stated that Murray came to Alexander's Bar twice, once in 1974 to inquire when Brooks was going to repay his debt to Barone and again in 1975 to pick up some women at which time Brooks threw him out of the bar (Tr. 1417-1431).

The defendants Iarossi, Blanchard, Croce and Anatala did not testify or present any other evidence. Panebianco's defense consisted of a stipulation that at the time of his post-arrest interview he gave his date of birth as December 9, 1920 (Tr. 1346).

## ARGUMENT

### POINT I

**The motion to suppress the one pound of heroin seized from Croce on February 6, 1973, was properly denied.**

Croce claims that Judge Bonsal erred in denying his motion to suppress the pound of heroin seized from him on February 6, 1973. His argument, while confusing, appears to be that 1) the issue has already been resolved adversely to the Government by a determination in state court that the heroin should be suppressed; 2) there was no probable cause to arrest Croce on February 6, 1973; and 3) the search of Croce's car following his arrest was illegal.* These claims are without merit.

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* Croce also appears to claim that Judge Bonsal "denied" him a hearing in this case. (Croce Br. at 16, 27). That is a total distortion of the record. Judge Bonsal's decision to rely upon the

[Footnote continued on following page]

## A) The Facts.

In order to understand the legal issue, a brief review of the facts before Judge Bonsal is necessary. The record upon which Judge Bonsal's determination was made consisted solely of the minutes of a hearing held before Justice Allen M. Myers of the New York State Supreme Court on April 16 and 30 and May 2, 1973, following which the Justice granted Croce's motion to suppress the heroin in an opinion dated July 16, 1973.* That record revealed the following.

New York Police Officers and agents assigned to the Office of Drug Abuse Law Enforcement (ODALE) a joint federal-state agency, were investigating two Bronx heroin dealers, Colin Carroll and Richard Navedo, during the latter part of 1972 and early 1973. Detective Ralph Nieves, acting in an undercover capacity, had made three purchases of quantities of heroin from Carroll prior to January 16, 1973. Carroll's source was established as being Navedo.

At 10:30 on the night of January 16, 1973, Patrolman Arthur Drucker of ODALE observed Graziano Rizzo and Renato Croce park a 1972 blue Oldsmobile Toronado in front of 1013 East 222nd Street, a one-family house where Navedo lived. Rizzo and Croce left the car and removed from the trunk a manila-colored package. Croce took the package, and Rizzo and Croce entered Navedo's

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minutes of the hearing before Justice Myer was based solely upon the request of the attorney for Graziano Rizzo, acquiesced in by Croce's attorney and by the Government. Croce never requested an independent hearing (Hearing before Judge Bonsal on May 12, 1975), nor did he offer to prove any additional facts, or request leave to do so.

* References in the form "'Hr" are to the minutes of those hearings.

house. Upon leaving, Croce and Rizzo were followed by Drucker and Agent Gartland. Their car went through a stop light, stopped in the middle of the street, made a complete U-turn and sped off. Officer Drucker and Agent Gartland were unable to follow them. (Hr. May 2, 1973 at 117-118).

On the following day, January 17, 1973, ODALE undercover agents purchased one-eighth of a kilogram of heroin from Carroll and Navedo for $4,500. The heroin was contained in a package similar to the one Croce and Rizzo had delivered to Navedo the night before (Hr. April 30, 1973 at 17, 50-51; May 2, 1973 at 119-121).

The agents continued their dealings with Carroll and Navedo and on January 31, 1973, Agent Carl Gordon, acting in an undercover capacity, met with Carroll to purchase yet another quantity of heroin. Prior to the purchase Agent Gordon and the defendant Carroll were parked in the vicinity of Navedo's house. Carroll pointed to Croce and Rizzo's car parked nearby and told Agent Gordon that if they went into Navedo's house while those guys were there "they would have dropped dead." (Hr. May 2, 1973 at 122-125). Special Agent Gartland and other surveillance agents had a few minutes earlier seen Croce and Rizzo arrive in front of Navedo's house in their blue Oldsmobile, park the car and enter Navedo's house. They stayed only a few minutes and drove away. (Hr. April 30, 1973 at 16, 51; May 2, 1973 at 121-122).

Later that evening Carroll sold Agent Gordon a quantity of heroin.

On the evening of February 6, 1973, Agent Benson was initially conducting surveillance at 2180 219th St., off

Bronxwood Avenue.* He heard a radio report from other agents that a blue Toronado with the same two males was seen at the gas station where the undercover agents had previously purchased heroin from Colin Carrol. (Hr. April 16, 1973 at 22.) Later that evening, after Navedo had been arrested and narcotics seized at the gas station, Benson assisted in the execution of a search warrant at Navedo's home which disclosed more narcotics (Hr. April 16, 1973 at 24). While leaving Navedo's house, Benson saw a blue Oldsmobile proceed to slow down as if to park on the other side of the street. As the driver of the car looked in the direction of Benson and other agents, the car sped off. (Hr. April 16, 1973 at 23-26).

Benson and his companions began to chase the blue Oldsmobile, but lost sight of the car for a few minutes because "they were going quite fast, and they had a little bit of a start on us." (Hr. April 16, 1973 at 26-27). They caught up to the car while it was double-parked at Bronxwood Avenue and East 213th Street. Benson went over to the Oldsmobile, identified himself, pointed his weapon at Graziano Rizzo, and told him to get out of the car. (Hr. April 16, 1973 at 27). Benson, who saw defendant Croce in nearby telephone booth, then asked Rizzo who his friend was calling. Rizzo replied that he did not know Croce and was there by himself.

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* Prior to that date, Benson was told that a 1972 blue Oldsmobile had been observed in front of Richard Navedo's residence, that two unidentified male passengers had been observed going into Navedo's residence with a package, and that on one occasion Carroll had told Agent Gordon that he could not enter Navedo's house while this particular vehicle was parked in front (Hr. April 16, 1973 at 20). Benson also read reports concerning these incidents and had read a description of the individuals who had been driving this car before he left the office on February 6, 1973 (Hr. April 16, 1973 at 21; May 2, 1973 at 87).

Benson brought Rizzo over to a wall and went to speak to Croce. Croce asked Benson why he was being placed under arrest, and Benson told him for violation of the federal narcotics laws. (Hr. April 16, 1973 at 28-29).

Benson and the other government agents brought Croce and Rizzo back to Navedo's residence in separate cars (Hr. April 6, 1973 at 30). Upon arrival at Navedo's residence, Benson took the money the two defendants had and matched it against lists of money previously spent for the purchase of narcotics; the examination proved negative, and the money was returned. (Hr. May 2, 1973 at 82-83). Benson then asked Rizzo if in that case "we [could] go out and examine your car" and Rizzo said that "we could." (Hr. May 2, 1973 at 84). Benson, along with Patrolman Drucker and possibly another agent, went outside. After a search of the trunk revealed no contraband, Benson then asked Rizzo to open the passenger side of the car. A search underneath the passenger's front seat revealed a small manila envelope containing two plastic bags filled with heroin. (Hr. May 2, 1973 at 84-85).*

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* Other agents corroborated and completed Benson's narration of the events. Patrolman Drucker testified that he had seen the defendants Rizzo and Croce at approximately 7:10 p.m. on February 6, 1973, at the Partners Service Station having a conversation with Navedo and that he observed their car parked in front of the gas station. (Hr. April 30, 1973 at 8). He followed Rizzo and Croce as they left the gas station in the car, and subsequently at around 8:05 p.m. he returned to the gas station where he participated in the arrest of Richard Navedo and Colin Carroll. (Hr. April 30, 1973 at 9). At approximately 9:00 p.m., while he was assisting in the search of Navedo's house, Agent Benson entered the premises with defendants Croce and Rizzo. Drucker identified them as the ones he had seen previously in the area. (Hr. April 30, 1973 at 9-10). Drucker further testified that when he asked them if they had ever been at that residence be-

[Footnote continued on following page]

**B) The District Court was not bound by a prior determination in state court on the suppresion issue.**

Croce's first claim is that a prior determination by Justice Myers that the seizure of the heroin was illegal precluded the District Court from admitting the narcotics into evidence. While admitting the general rule that "collateral estoppel does not bar the Government from using evidence previously . . . suppressed in a state proceeding in which the Government was not a party . . ." Croce suggests that this applies "only where the issue of the validity of the search and seizure were not litigated in the state court." (Croce Br. at 28).

This is simply not the law. The duty of a federal court to make an independent inquiry concerning the admissibility of evidence in federal cases, *United States* v. *Beigel*, 370 F.2d 751, 756 (2d Cir.), *cert. denied*, 387 U.S. 930 (1967), does not depend on whether the evidentiary issue has been litigated in state court. In *Elkins* v. *United States*, 364 U.S. 206 (1960), the Supreme Court remanded for independent determination by a federal district court the issue of the constitutionality of a search and seizure that two state courts had found to be unlawful. The Court stated:

> "In determining whether there has been an unreasonable search and seizure by state officers, a

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fore, they denied it and said they were looking for women (Hr. April 30, 1973 at 11-12).

Detective Nieves also saw the 1972 Oldsmobile at the Partners Service Station on February 6, 1973, and saw defendants Graziano Rizzo and Renato Croce engaged in conversation with Richard Navedo inside the gas station. (Hr. May 2, 1973 at 140). After the defendants left the gas station, Nieves arranged for and purchased a quarter kilogram of heroin from Carroll. (Hr. May 2, 1973, 141).

> federal court must make an independent inquiry, *whether or not there has been such an inquiry by a state court*, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state may have countenanced, nor diminished by what another may have colorably suppressed." (Emphasis supplied.)

*Id.* at 223-4; *see also United States* v. *Burke*, 517 F.2d 377, 382 (2d Cir. 1975); *Rios* v. *United States*, 364 U.S. 253, 260-1 (1960). Thus, the District Court was free to disregard the previous state court ruling; indeed, it was under an obligation to decide for itself the constitutionality of the search of Croce's car.*

### C) There was more than probable cause to arrest Croce and seize his car.

Croce's claim that his arrest was not based on probable cause is similarly unconvincing. The facts known by the agents about Croce and Rizzo prior to the arrest—their delivery of a package to Navedo prior to a narcotics sale by Navedo involving a similar package; their meetings with Navedo shortly before two *other* narcotics transactions; Carroll's statements that they "would have dropped dead" had they met the undercover agents; and

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* *Ferina* v. *United States*, 340 F.2d 837 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965), cited by appellant in support of his claim, simply restates the principle that he seeks to qualify, *i.e.*, "to bar the litigation of an issue, the same issue must have been determined favorably to the accused . . . in a prior adjudication between the *same parties*." (Authorities omitted) *Id.*, at 839 (Original emphasis). Since this case involves the prosecution of appellant by a second and different sovereign, the rules of collateral estoppel do not apply.

their appearance immediately after the last sale—all established that Croce and Rizzo were associates with Carroll and Navedo in the narcotics transactions. When coupled with their activity immediately prior to the arrest —the obvious attempts to avoid surveillance; their flight when they observed Agent Benson; and their obviously false exculpatory statements at the time they were caught —the agents had overwhelming reason to believe that Croce and Rizzo were engaged in narcotics transactions using their automobile, as Judge Bonsal found in his memorandum opinion dated September 17, 1975. *United States* v. *Mapp*, 476 F.2d 67, 73 (2d Cir. 1973); *United States* v. *McCarthy*, 473 F.2d 300, 305-06 (2d Cir. 1972); *United States* v. *Canieso*, 470 F.2d 1224, 1230 n. 7 (2d Cir. 1972); *United States* v. *Olsen*, 453 F.2d 612, 615-16 (2d Cir.), *cert. denied*, 406 U.S. 927 (1972); *United States* v. *Price*, 441 F.2d 1092, 1093 (2d Cir. 1971). It follows that their arrest and the seizure of the car were perfectly proper.*

## D) The seizure and search of the car was proper

Finally, once it is established that the officers had probable cause to believe that Croce and Rizzo were engaged in a narcotics transaction in which they had used the car, it follows that the seizure and search of the car were permissible irrespective of the validity of the consent by Croce and Rizzo. Both the Contraband

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* The issue whether Croce and Rizzo were technically "arrested" at the time of the seizure is irrelevant. This Court has held that once probable cause to arrest exists, a search prior to the actual arrest does not "render it [the search] illegal as long as probable cause to arrest existed at the time of the search." *United States* v. *Jenkins*, 496 F.2d 57, 73 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); see also *United States* v. *Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973).

Seizure Act, 49 U.S.C. §§ 781-739, whose provisions this court found to be constitutional in *United States* v. *Francolino*, 367 F.2d 1013, 1022 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967), and Title 21, U.S.C. Section 881(a)(4) make it a crime to use a vehicle to "facilitate the transportation" of narcotics. Under Title 49 U.S.C., Section 782, any vehicle which "has been or is being used" in violation of Section 781 is directed to be seized. See also 21 U.S.C. § 881(a). In construing the Contraband Seizure Act, this Court has held that when federal agents have probable cause to believe that a vehicle is seizable, they may search it without a warrant, *United States* v. *Zaicek*, 519 F.2d 412, 414 (2d Cir. 1975); *United States* v. *Capra*, 501 F.2d 267, 280 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Francolino*, *supra*, at 1021; *compare Cooper* v. *California*, 386 U.S. 58, 61 (1967), regardless of whether the vehicle has first been seized, *United States* v. *LaVecchia*, 513 F.2d 1210, 1216 (2d Cir. 1975).*

Croce argues that these provisions cannot be invoked to justify the search of his automobile, because "the record is devoid of any indication that the federal officers making the 'arrest' and the seizure did so in reliance upon such provision", and "the operation of the agents minds at the time the seizure and arrests were made, as evidenced by their testimony at the hearing, conducted shortly after the events, should control" (Croce's Br. at 30, 31).

The rationale offered by the agents for the arrest is, of course, irrelevant. *United States* v. *Francolino*,

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* Title 21, United States Code, section 881(a) specifically notes that "no property right shall exist" in the seized articles.

*supra*, at 1022.* Thus, this Court has indicated that one "looks to the facts known to the agents at the time of arrest rather than to their characterization or stated basis for their behavior". *United States* v. *Martinez*, 465 F.2d 79, 81 (2d Cir. 1972); *Ralph* v. *Pepersack*, 335 F.2d 128, 135 (4th Cir. 1964), *cert. denied*, 380 U.S. 925 (1965) (constitutional questions are not to be decided by terms police officers use to describe their activity); *Davida* v. *United States*, 422 F.2d 528, 531 (10th Cir.), *cert. denied*, 400 U.S. 821 (1970) (search not made under subjective knowledge of right to make the same, but in fact lawfully made, remains lawful and evidence obtained is admissible). See also *United States* v. *Robinson*, 414 U.S. 218, 236 (1973). The only condition is that "the 'crime under which the arrest is made and a crime for which probable cause exists are in some fashion related'." *United States* v. *Martinez*, *supra*, at 81; *United States* v. *Atkinson*, 450 F.2d 835, 838-9 (5th Cir. 1971), *cert. denied*, 406 U.S. 923 (1972). That condition was of course met here. It follows that the seizure of the heroin was proper, and the District Court's decision to admit it into evidence was correct.

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* As one judge has stated, "On this subject of automobile searches, which has not produced a simple and symmetrical jurisprudence, it may not be astonishing that law enforcement officers and counsel lack neat or entirely consistent theories." *United States* v. *Capra*, 372 F. Supp. 600, 602 (S.D.N.Y. 1973) (Frankel, *J.*), *aff'd*, 501 F.2d 267 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

## POINT II

### Rizzo was not denied a fair trial by the admission of prejudicial testimony.

Leonard Rizzo contends that his conviction should be reversed because the jury heard testimony of threats made on the life of Government witness Mary Mobley by Leonard Rizzo, his brother Graziano Rizzo (Ju Ju), and Alvin Clark. This contention disregards the record and is utterly meritless.

During direct examination, Mobley did not testify about the threats made against her life. In fact, she was specifically and carefully directed by the prosecutor not to relate the substance of the telephone conversation between the Rizzo brothers and Alvin Clark in which the threats were made.* However, on cross-examination by

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* Q. [By Mr. Garnett] And what happened with it subsequent to that? A. I think the next day I went to get the package. I gave half of it away, and then I finally talked to Al [Clark]. Al kept asking me what happened to the package. I told him I had to get rid of it, you know, and he kept asking me. I kept telling him. So he told me that Ju-Ju wanted to talk to me on the phone.

So he came to pick me up and we rode out Bellevue in Pittsburgh. There was a pay phone and he called Ju-Ju. Him and Ju-Ju was talking for a while.

Q. *Don't tell us the conversation.* Was there a conversation between Al and Ju-Ju? A. Yes.

Q. Was there a conversation between yourself and Ju-Ju? A. I was listening in, but it wasn't, you know, my conversation.

Q. You didn't speak with him yourself? A. No.

Q. And subsequent to that what happened, subsequent to that conversation? A. Ju-Ju was telling—

Q. *Well, don't tell us what the conversation was about.* Tell us what happened after that conversation. A. I hung up the phone on him and then Al called him back and talked for a

[Footnote continued on following page]

counsel for Iarossi, Mobley was specifically asked about Government assistance to her while she was under protective custody (Tr. 207-209). Later during this cross-examination, Mobley was asked the purpose of her arranging for Clark to be arrested by Pittsburgh police. She explained that she did so to prevent Clark from bringing the Rizzo brothers to her location to harm her (Tr. 272-273).*

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couple of more minutes. And then Al rode me home. And Al told me that Ju-Ju and Lennie——

D. *Don't tell us that conversation.* As a result of that conversation you had with Mr. Clark did there come a time when you made arrangements to deliver some narcotics to Mr. Clark?

MR. STOKAMER: Your Honor, I object. Mr. Garnett is putting the words in the witness' mouth.

THE COURT: I will allow it.

You can answer that question. Did there come such a time?

THE WITNESS: Yes.

Q. Now, would you tell us what happened or how that delivery was made? A. Well, I went and got about three ounces and I had someone put it in a shop, in a garbage can. I called Al and I told him I was going to give him three ounces. Then I called the police and told the police that he had drugs in his garbage, in the shop. (Tr. 187-189) [emphasis supplied].

*Appellant Rizzo in his brief p. 9 claims Mobley was allowed to answer over defense objection. This is patently false. In making her response to the question from Mr. Zelenko, Mr. Mr. Zelenko moved to strike her attempted answer as non-responsive; however, the District Court judge properly allowed the witness to answer. Counsel was aware of the nature of the answer and neither withdrew the question prior to the answer nor sought to strike the answer after it was made:

Q. [By Mr. Zelenko] And what was the purpose of dropping it into the garbage can in Alvin Clark's shop? A. Because when I took the drugs off of Lennie and Ju-Ju——

MR. ZELENKO: I move to strike that out.

MR. GARNETT: She is trying to explain.

THE COURT: He wants to know why you did it.

[Footnote continued on following page]

On redirect examination the prosecutor sought, and was granted, an opportunity to clarify the matter of the threats by the Rizzo brothers, the set-up of Alvin Clark, and her being placed in protective custoday—matters that were raised but not explained during defense cross-examination. Judge Bonsal ruled:

> I'm afraid I am going to allow that. There was a lot of testimony about the set-up here and it was gone into in great detail, and I think if the Government can do anything about that, they are entitled to do it. [Tr. 357]

Counsel requested a limiting instruction concerning this testimony, and Judge Bonsal instructed the jury that these statements were subject to connection and were introduced only against Rizzo (Tr. 361, 364-365). Rizzo's claims of improper admission of this evidence are thus flatly contradicted by the record since the evidence—which at any rate was not extensive or repetitious—was admit-

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THE WITNESS: When I took the drugs off Lennie and Ju-Ju——

MR. ZELENKO: Your Honor, I move to strike.

THE COURT: She is going to answer.

Pardon me, Miss, do you understand?

THE COURT: Wait.

You can answer the question of what the purpose is. If that is part of the purpose go ahead and tell us.

THE WITNESS: When I took the drugs off Ju-Ju and Lennie, they didn't like it. They said a couple of things about it and so Al was supposed to do something to me. I asked him if he would do it and he said yes, he would bring them right to my front door.

So I brought the drugs there so he wouldn't be around to bring them to my front door.

Q. Now, if you don't understand my questions, please tell me, all right?

Why did you have these three ounces of heroin put into the garbage of Mr. Clark? What were you going to do? A. Set him up. (Tr. 272-275).

ted solely to complete a partial and distorted picture of the facts elicited by defense counsel after the prosecutors had properly and carefully refrained from adverting to the matter. See *United States* v. *Rivera*, 513 F.2d 519, 528 (2d Cir.), *cert. denied*, — U.S. — (1975).

Moreover, evidence similar to that at issue here has been held admissible when it was similarly explanatory of other testimony in a trial. In *United States* v. *Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973), the court held it was proper for a witness to explain that he had failed to fully implicate the defendant before trial because he was told the defendant would have him killed. *See also, United States* v. *Berger*, 433 F.2d 680, 683-84 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971); *United States* v. *Franzese*, 392 F.2d 954, 960-61 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); *United States* v. *Scandifia*, 390 F.2d 244, 250 (2d Cir. 1968), *vacated and remanded on other grounds*, 394 U.S. 310 (1969). As Judge Friendly wrote in *Franzese, supra*, 392 F.2d at 960, "[w]hile rehabilitation of this sort may well have a spill-over effect *the process is essential to development of the truth* and reliance must be placed on trial judges to prevent unfair tactics by the prosecution." (Emphasis supplied). The "process" of bringing out the entire truth of the matter was clearly made necessary by defense counsel's incomplete elicitation of the facts of Mobley's "set up" of Clark.

Finally, even were it assumed that admitting the testimony was error, its admission was harmless. Not only was the evidence of minimal impact, but the rest of the evidence against Rizzo was overwhelming. *Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969); *United States* v. *Araujo*, — F.2d —, Slip op. 5101 (2d Cir. July 16, 1976); *United States* v. *Williams*, 523 F.2d 407 (2d Cir. 1975); *United States ex rel. Joseph* v. *LaVallee*, 415 F.2d 150 (2id Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Wapnick* v. *United States*, 406 F.2d 741 (2d Cir. 1969).

## POINT III

### The page from Navedo's telephone book was properly admitted against Blanchard.

When co-conspirator Richard Navedo was arrested on February 6, 1973, a page in his personal telephone book bore the following entry:

> Jim Blanchard (The Jap)
> Somewhere on Green St
> Balt Md

(GX 16A; Tr. 878-880). Blanchard contends that by admitting the exhibit into evidence the trial Judge abused his discretion, thereby committing reversible error, because "[a] connection was never subsequently established between Blanchard and Navedo" . . . and ". . . no connection was ever established to identify the 'Jim Blanchard referred to in Navedo's address book as the 'Snyder' Blanchard on trial." The defendant further contends that even if such a connection had been made, that ". . . no evidence was ever presented to prove that the notation was prepared in furtherance of the conspiracy." (Br. at 3-4). This claim is meritless.

The entry on its face establishes a connection between Snider Blanchard and the Blanchard referred to in Navedo's address book. Other evidence introduced during the trial proved that Blanchard resided at 5803 Greenspring Avenue, in Baltimore, Maryland; that Manfredonia and Iarossi had delivered heroin to Blanchard in Baltimore, Maryland; and that Blanchard's nickname was "The Jap." An overwhelming inference could be drawn that the Blanchard in Navedo's address book was the same Blanchard who was on trial and that Blanchard's name was in Navedo's address book because Navedo knew

Blanchard or was associated with him or was provided the name by his two heroin suppliers, Croce and Graziano Rizzo. At the very most, the name "Jim" instead of "Snider" in the address book goes to the weight to be given this evidence by the jury and certainly does not indicate any clear abuse of discretion by the trial judge. *United States* v. *Dwyer*, Dkt. No. 76-1108 slip op. 5091, 5096 (2d Cir. July 26, 1976). Moreover, the probative value of this evidence is particularly evident from the defendant's failure to offer into evidence anything which would have suggested that a Jim Blanchard lived on Green Street in Baltimore, Maryland.

Also, contrary to the defendant's claim, there was ample evidence that the notation was made in furtherance of the conspiracy by Navedo as a means of communicating with a co-conspirator, Blanchard. Indeed, there is absolutely no question that the notation was made during the existence of the conspiracy, which lasted from 1966 to June 1973. The notation could not have been made prior to the commencement of the conspiracy since it appeared in an address book for the year 1973 and the notation could not have been made after the conspiracy terminated since the address book was seized on February 6, 1973.

This Court has on numerous occasions upheld the admissibility of such evidence as non-hearsay evidence tending to show a relationship among conspirators. *United States* v. *Ruiz*, 477 F.2d 918, 919 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States* v. *Ellis*, 461 F.2d 962, 970 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Garelle*, 438 F.2d 366, 368 (2d Cir.), *cert. dismissed*, 401 U.S. 967 (1971). The District Court was plainly correct in allowing the address book into evidence here.

## POINT IV

**The evidence established each defendant's membership in a single conspiracy, and the defendants were properly tried together.**

Five of the seven appellants—Panebianco, Iarossi, Brooks, Anatala and Croce—each assert that the evidence at trial established the existence of several distinct conspiracies rather than the one conspiracy charged in the indictment. Croce and Brooks also claim that there was insufficient evidence to support their convictions on the conspiracy and substantive counts, and further that the trial court erred in not granting their pre-trial motions for a severance. These arguments are factually and legally unsupportable.

### A. The evidence demonstrated a single conspiracy.

Those appellants raising the single/multiple conspiracy issue claim that the proof at trial showed two or more conspiracies rather than the single conspiracy charged in the indictment. This argument not only distorts the evidence presented to the jury, which quite clearly showed the organization and existence of a single conspiracy in which all the appellants joined, but ignores the controlling law in this Circuit.

It should be noted that the question whether the Government has met its burden of demonstrating a single conspiracy is one for the jury, rather than the trial judge or this Court, to decide. *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3624 (May 3, 1976); *United States* v. *Torres*, 519 F.2d 723 (2d Cir.), *cert. denied*, — U.S. — (1975); *United States* v. *Calabro*, 449 F.2d 885, 893 (2d Cir.

1971), *cert. denied*, 404 U.S. 1047 (1972); *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Crosby*, 294 F.2d 928 (2d Cir.), *cert. denied*, 368 U.S. 984 (1961). Thus, particularly since no appellant raises any question about the propriety of the instructions to the jury on this issue, the true issue on appeal is whether, when viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), the evidence was sufficient for the jury to find that a single conspiracy existed. Furthermore, even if the overall conspiracy could be divided into component parts, "where there was proof of the single, overall conspiracy, the fact that there also was evidence adduced of other conspiracies or that the jury could have found two *major* conspiracies does not require a mandatory charge of acquittal." *United States* v. *Tramunti*, 513 F.2d 1087, 1108 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). We submit that the Government demonstrated all the relevant criteria articulated in prior decisions of this Court tending to show the existence of a single conspiracy.

Despite appellants' insistence to the contrary, the evidence at the trial of the instant case established that each of the defendants was an important link in a classic "vertically intergrated loose knit combination" peculiar to the narcotics business in New York. *United States* v. *Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). The sole purpose for the conspiracy was the purchase and sale of heroin for profit. *United States* v. *Sperling*, 506 F.2d 1323, 1340 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). As in *Bynum*, *supra*, the conspiracy had three

levels: suppliers, middlemen and customers. The organization in Queens headed by Vincent Papa, who was assisted by the defendants Alessi and Passero, supplied heroin on a continuous bi-weekly basis to Manfredonia and those working with him during the entire course of the conspiracy. When on occasion the Papa organization was temporarily unable to supply narcotics, the appellant Panebianco, whom the evidence disclosed had access to large quantities, supplied the heroin required by Manfredonia, Iarossi and Barone. Manfredonia and Iarossi, and later Barone, in turn resold the heroin obtained from Papa and Panebianco directly to their customers below them in the chain. Those customers included co-conspirators Clark and Mobley in Pittsburgh, the appellant Blanchard in Baltimore, and Brooks and Anatala in New York. The appellants Croce and Leonard Rizzo and the defendant Graziano Rizzo also received heroin from the Papa organization and from Panebianco. In addition, the Rizzo group and Manfredonia and Barone rendered assistance to each other by supplying each other with heroin as well as simultaneously supplying heroin to mutual customers, Clark and Mobley. Indeed, the Rizzos gained access to the Pittsburgh customers by the appellant Iarossi in payment for a debt.

Thus, the proof at trial demonstrated a business operation the sole purpose of which was to distribute heroin from and in New York City. The organization had stable and continuing sources of supply—Papa and his associates, or, when they were unable to find heroin, Panebianco—and remarkably similar methods of distribution. Additionally, the interrelation among virtually all the members of the conspiracy showed that the defendants were not members of discrete groups. Thus, Croce and the Rizzo brothers not only received heroin from the same source as Manfredonia, Iarossi and Barone and distributed

it to a common customer, Clark, but were introduced to Clark by Iarossi. In addition, of course, the Rizzos and Manfredonia shared their supplies of heroin. There was thus "ample evidence to demonstrate their awareness of the conspiracy's horizontal scope." *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975), *cert. denied*, — U. S. — (1976); *United States* v. *Borelli*, 336 F.2d 376, 383 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Miley*, 513 F.2d 1191, 1207 (2d Cir.), *cert denied*, — U.S. --- (1975). Furthermore, the detailed interrelationships among the conspirators was further demonstrated by such evidence as the notebook containing the name of Blanchard—Manfredonia's first regular customer—on Navedo at the time of his arrest in 1973; the meeting among Manfredonia, Barone, Murray, Graziano Rizzo and Anatala in 1972; and the heroin transaction among Manfredonia, Graziano Rizzo and Panebianco in the summer of 1971. Thus, this is simply not a case where "the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top." *United States* v. *Sperling*, *supra*, 506 F.2d at 1340-41; see also *United States* v. *Miley*, *supra*, 513 F.2d at 1207, since there was specific evidence that the members of the various branches of the conspiracy not only knew of each other but actually dealt with one another at all levels of the conspiracy. There was thus far more evidence of "mutual dependence and assistance" than that which convinced this Court in *United States* v. *Tramunti*, *supra*.

Furthermore, the amounts, regularity and quality of the heroin shipments allowed—indeed, demanded—the inference that each member of the conspiracy knew that he was participating in a larger framework than those with whom he directly dealt. *United States* v. *Leony*, Dkt. No. 76-1001, slip op. 4347, 4352 (2d Cir., June 23, 1976);

*United States* v. *Papa*, 533 F.2d 815 (2d Cir. 1976); *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Sperling*, *supra* at 1340; *United States* v. *Arroyo*, 494 F.2d 1316, 1319 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Bynum*, *supra* at 495; *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). It follows that the jury was amply justified in its finding that a single conspiracy existed.

Appellants' attempts to dispel the obvious force and applicability of these precedents are unavailing. Some of the appellants argue that since Manfredonia testified that he did not sell heroin during several months in 1970, there existed two conspiracies, one before and one after his brief respite. This argument ignores the fact that both before and after his hiatus Manfredonia used the same source for heroin—generally the Papa group, with occasional purchases from Panebianco—and continued to deliver to the same principal customers, that is, Clark and Blanchard. Thus, the only change in the conspiracy after his return to business was the adoption of Barone as a new associate and the continued expansion of the scope of the conspiracy through the addition of new customers. In view of the fact that a gap or change in personnel in a conspiracy does not alter the unified nature of the conspiracy, see *United States* v. *Stromberg*, 268 F.2d 256, 263-64 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States* v. *Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Calabro*, 467 F.2d 973, 982-83 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973), this argument is merit-

less. In addition, of course, Mary Mobley demonstrated that the Rizzo brothers and their associates continued their narcotics transactions before, during and after Manfredonia's absence. The continuation of the distribution of narcotics after Iarossi's incarceration in 1970 was "well within the scope of the initial undertaking," and thus his participation "in that segment of the conspiracy inculpates him as a member of the conspiracy." See *United States* v. *Salzar*, 485 F.2d 1272, 1276 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974; *United States* v. *Gentile*, 530 F.2d 461, 466 (2d Cir. 1976). This is particularly clear since the continued dealing between Croce, the Rizzos and Clark was initiated by Iarossi, who introduced Clark to Graziano Rizzo shortly prior to his arrest in payment of a debt. *United States* v. *Agueci*, 310 F.2d 817, 838, 839 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States* v. *Borelli*, *supra*, 336 F.2d at 388-90.

Second, certain appellants argue that since there was no evidence tending to show the source of the heroin found on Graziano Rizzo and Croce at the time of their arrest, that seizure was necessarily part of a different conspiracy. In view of the fact that Navedo was shown to have had at least some contact with Blanchard and was clearly consummating the transaction with Croce and Graziano Rizzo, this argument is without force. The failure to adduce proof of the source of the heroin was a necessary lacuna that hardly vitiated the other evidence showing that that sale was part of the same conspiracy. Finally, the evidence of that seizure would have been fully admissible to show Croce and Graziano Rizzo's membership in the conspiracy, see *United States* v. *Araujo*, Dkt. No. 76-1085, slip op. 5101, 5103 (2d Cir., July 26, 1976); see also *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973), and

to show the relationships among Croce, Graziano Rizzo and Blanchard, see *United States* v. *Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3608 (April 26, 1976). Thus, even if this seizure were not technically part of the conspiracy—although we strongly reaffirm that it was—the evidence would nonetheless have been admissible, and thus no defendant was prejudiced. *United States* v. *Miley*, *supra*, 513 F.2d at 1207.

Finally, the complaining defendants reliance on *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is totally misplaced. There, the Court reversed the convictions of the seven defendants finding that the Government proved not the single conspiracy charged in the indictment but at a minimum "at least four separate conspiracies only one of which resembled the orthodox business operation — found to exist in narcotics conspiracies" and further that two of the proven conspiracies were nothing more than cash thefts. *Id.* at 155. Thus the court in *Bertolotti* concluded that there was no showing that the two principal actors were conducting a regular business on a steady basis. *United States* v. *Bertolotti*, *supra* at 155. It further noted that "the only common factor linking the transactions was the presence of" two conspirators. *Id.* In view of the repeated demonstration of interrelationships and interdependence at all levels of what is concededly the "tradtional *modus operandi* with middleman purchasing narcotics for sale to a series of customers" found lacking in *Bertolotti*, *supra*, the inapplicability of that decision to this case is obvious.

In conclusion then, the evidence at trial established the existence of but a single conspiracy in which all of the participants dealt with each other in massive amounts of heroin over a five year period. Thus, the jury's finding of a single conspiracy, pursuant to instructions that are not

challenged here, was entirely proper. *United States* v. *Leong, supra;* see *Blumenthal* v. *United States*, 332 U.S. 539, 545-55 n.14 (1947); *United States* v. *Ortega-Alvarez, supra*, at 457; *United States* v. *Calabro, supra* at ....; *United States* v. *Mallah*, 503 F.2d 971, 983-84 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States* v. *Arroyo, supra* at 1319.

## B. The sufficiency of the evidence.

The appellants Brooks and Croce each claim that the evidence was insufficient to convict them of the conspiracy and substantive counts in the indictment. Their arguments are frivolous.

### 1. Brooks.

In the summer of 1971, Barone told Manfredonia that Brooks owed him $58,000 for two kilograms of narcotics that Barone had previously given him. Manfredonia and Brooks went down to an apartment over the Melody Liquor store at 120 West 116th Street in Manhattan. There, in Manfredonia's presence, Brooks gave Barone $28,000 of the $58,000 owed for the two kilograms. Brooks at that time requested Manfredonia and Barone to supply him with another one-half kilogram of heroin. A few days later, Manfredonia and Barone returned to Brook's liquor store with the half kilogram of heroin. When they arrived Brooks was standing outside the store and he and Barone, carrying the heroin, went upstairs and returned approximately 45 minutes later. Barone

no longer had the half kilogram of heroin but did have $13,000 (Tr. 451-454, 619-626, 644-646).*

In addition to this transaction, Murray testified that some time after he had begun delivering heroin for Manfredonia he accompanied Barone to Gunhill Road in the Bronx where Barone delivered a package to Brooks. Murray also accompanied Barone on a subsequent occasion to a Bronx bar where Barone delivered another package to Brooks.** In late 1974 or early 1975, Barone instructed Murray to contact Brooks to see if he wanted to do business. Murray and Brooks discussed dealing in narcotics and Brooks at first agreed to do business but when Murray quoted a price Brooks said he could get it cheaper elsewhere. (Tr. 693-699, 734-741).***

The testimony thus established that Brooks purchased in total over two and one-half kilograms of heroin from Barone, Manfredonia and Murray for which he paid over $41,000. His claim that this evidence was insufficient for the jury to find him a member of the conspiracy is frivolous. *United States* v. *Tramunti, supra; United States* v. *Ortega-Alvarez, supra; United States* v. *Mal-*

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* This transaction formed the basis for the substantive charges against Brooks in the thirteenth count of the indictment, of which he was convicted. (App. 12).

** Although there was no testimony as to the contents of the packages, the jury could readily infer from prior dealings that they contained heroin.

*** Brooks, who testified in his own behalf, denied any dealings in narcotics, but did admit knowing Barone, Murray and G. T. Watson. He also acknowledged his meeting with Barone in his apartment over the liquor store in the summer of 1971, but claimed that Barone was there to collect money. Murray, according to his testimony, visited Alexander's Bar bar owned by Brooks looking for girls. (Tr. 1423-1427; 1452-1455).

*lah, supra; United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). In particular, this Court has held that once a conspiracy has been established, relatively slight evidence will suffice to demonstrate a conspirator's membership in it. *United States* v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974). Questions of credibility, of course, are the jury to resolve. *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974).

Furthermore, Brook reliance on the "single act" doctrine in *United States* v. *DeNoia*, 451 F.2d 979 ,2d Cir. 1971) (Br. at 17-18), is unavailing. Not only did the direct evidence establish that Brooks participated in the conspiracy through considerably more than a single act, but also the "qualitative nature of the [defendant's] act or acts . . . viewed in the context of the entire conspiracy," *United States* v. *Torres*, 503 F.2d 1120, 1123-24 (2d Cir. 1974), itself makes Brooks' knowledge of and participation in the full scope of the conspiracy overwhelmingly clear.*

## 2. Croce

The Government's witness Mary Mobley testified that during the period she was picking up heroin in New York from Leonard and Graziano Rizzo, she on one occasion

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* To the extent that Brroks may be considered to make a claim that the Government failed to meet its burden of demonstrating by a preponderance of the non-hearsay evidence, see *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied*, as *Lynch* v. *United States*, 397 U.S. 1028 (1969), that Brooks conspired with others named in the indictment, the testimony of direct narcotics transactions and discussions with Brooks makes that argument frivolous.

in late 1970 or early 1971 met Leonard Rizzo in New York with the defendant Renato Croce. Leonard introduced Croce to her as "Rene" and said he would probably be there the next time. Mobley then gave Leonard money and Croce handed her a package of heroin (Tr. 190-192-335-336).

At 1:30 p.m. on January 19, 1973, Croce and Graziano Rizzo drove up to Richard Navedo's Bronx house. Croce removed a manila envelope from the trunk of the car and he and Graziano entered Navedo's house. When they returned to their car they took what only could be described as evacsive maneuvers. The following day an undercover police officer purchased an eighth of a kilogram from co-conspirator Colin Carroll who had left with Navedo to obtain the heroin. On January 31, 1976 Croce and Graziano Rizzo returned to Navedo's house and entered and stayed about five minutes. On February 6, 1973, Croce and Graziano Rizzo were again seen with Navedo at Navedo's gas station. The undercover police officer that day prchased a quarter of a kilogram of heroin from Navedo and Carroll at the gas station. Navedo and Carroll were arrested and taken to Navedo's house where later in the evening Croce and Graziano Rizzo were observed driving by Navedo's house and speeding off when they observed agents leaving Navedo's house. When apprehended there was approximately a half kilogram of heroin in a manila envelope, hidden under the passengers seat of their car. (Tr. 846-859, 868-884, 913-924).

Thus, the evidence demonstrated that Croce had along with Leonard Rizzo delivered heroin to Mary Mobley in 1971 and some two years later had along with Graziano Rizzo delivered or was in possession of over another kilogram of heroin. Particularly in view of the other evidence showing the relationship between the Rizzo brothers, the evidence was clearly more than sufficient proof of Croce's membership in the conspiracy. *United States* v. *Ortega-Alvarez, supra; United States* v. *Mallah, supra.*

In short, as to both Brooks and Croce, this is simply not a case like *United States* v. *Steinberg*, *supra*, 525 F.2d at 1133-34, where there was no "fixed agreement" to participate in narcotics transactions. Both Brooks and Croce actively participated in the transfer of large amounts of heroin and a conspiracy to do so, and were properly convicted of those crimes.

## C. Severance.

Croce and Brooks also claim that the trial court erred in not granting their severance motions. However in view of the single conspiracy proven at trial, Judge Bonsal's decision was clearly correct. *United States* v. *Bynum*, *supra*, 485 F.2d at 497.

The trial judge possesses wide discretion in granting motions to sever and "a trial judge's refusal to grant a severance will rarely be disturbed on review." *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971). The established rule is that a defendant "must demonstrate substantial prejudice from a joint trial and not just a better chance of acquittal at a separate one." *United States* v. *De Sapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Frantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972).

The claims of Croce and Brooks that there was substantially more evidence against the other defendants than against them rings hollow. Brooks was shown through the testimony of two witnesses to have purchased well over two and one-half kilograms of heroin for which he paid or owed over $70,000. Croce was shown to have delivered heroin to Mary Mobley and, by the testimony of three law enforcement persons, to have engaged in heroin transactions with Graziano Rizzo and Navedo. In addition, he was the only defendant

on trial from whom there was a direct seizure of heroin. Thus neither defendant has demonstrated the degree of prejudice that would warrant a severance, *United States* v. *Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972), *cert. denied*, 410 U.S. 982 (1973), and absolutely no abuse of discretion by the trial judge is shown.

## POINT V

### Appellants were not denied their Sixth Amendment rights to trial by an impartial jury.

Blanchard, Anatala and Panebianco demand a new trial based on their claim that the trial judge abused his discretion by declining to question two jurors who allegedly expressed annoyance at questions propounded during the cross-examination of a Government witness. They also claim that these expressions of annoyance established that the jury was biased against them thereby depriving them of their Sixth Amendment right to an impartial jury.

Counsel for Panebianco informed the court on February 3, 1976, that on the preceding day during cross-examination of Agent Carter by counsel for Anatala, he had overheard Juror No. 10 say "Why doesn't he stop wasting my time with these questions" and that Juror No. 10 then turned to speak to Juror No. 9 but this conversation was not audible. Counsel for Panebianco also reported that Panebianco had overhead Juror No. 3 say, "He's got some nerve asking these questions." Counsel for Panebianco further reported that during his own cross-examination of the witness, he overheard Juror No. 10 say "Well, he's already answered that question." Counsel for Anatala and Panebianco then asked the trial judge to voir dire jurors No. 3 and 10 to ascertain whether they

had been discussing the case with other jurors and whether they had formed a premature opinion as to the guilt or innocence of the defendants (Tr. 1139-40).

The trial judge elected not to voir dire the jurors but instead instructed the jury that they should not discuss the case among themselves nor form any opinion until all the evidence was in (Tr. 1141-44, 1195-96). This procedure was entirely correct.

The trial judge has broad discretion in dealing with allegations of juror misconduct and his rulings in dealing with this alleged misconduct should not be reversed in the absence of a clear abuse of that discretion. *United States* v. *Bando*, 244 F.2d 833, 848-49 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957); *United States* v. *Flynn*, 216 F.2d 354, 372 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955); *United States* v. *Falange*, 426 F.2d 930, 933 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970); *Gordon* v. *United States*, 438 F.2d 858, 874 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971). The trial judge, who closely observes the conduct of the jury throughout the trial, is in the best position to determine whether a particular incident of alleged juror misconduct is prejudicial, *United States* v. *Bando*, *supra*, 244 F.2d at 848-49, as well as to determine the extent and type of investigation necessary. *Gordon* v. *United States*, *supra*, 438 F.2d at 874. As this Court has stated in *United States* v. *Flynn*, *supra*, 216 F.2d at 372:

> "We are now asked to hold that the motions . . . for a further investigation of the jury . . . should have been granted. All of these matters were for the trial Court's discretion which, unless we find it clearly abused, we should not disturb . . . Especially is this so on a matter of such delicacy as that involving the retention or discharge of a sitting juror, in which right judgment depends so heavily on the impressions formed from direct contact."

Judge Bonsal certainly did not abuse his discretion here. The statements attributed to the jurors did not indicate any possibility of bias against any of the defendants on trial. They were almost certainly a reaction by the jurors to irritating and repetitive questioning by defense counsel on cross-examination, and at most indicated an attitude toward counsel rather than defendants. Indeed, counsel for Panebianco admitted that during his questioning he had gotten "sidetracked and . . . ask[ed] too many questions" (Tr. 1140). Counsel for Anatala also admitted that while he was cross-examining he "was a little facetious about things. . . ." (Tr. 1141). Further, Judge Bonsal specifically found that his observations of the jury throughout the trial impressed him considerably. He also determined that the interviewing of the jurors in question would probably result in more harm than good, and that the matter was best forgotten (Tr. 1141-42). The judge did, however, upon request give a cautionary instruction to the jury which counsel for Iarossi agreed might eliminate or mitigate any possible harm (Tr. 1144).*

In view of these facts, Judge Bonsal clearly did not abuse his discretion. *United States* v. *Bando*, *supra* 244

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* Judge Bonsal instructed the jury as follows: "I have told you every day not to discuss the case with anyone at all. I keep repeating that and, of course, I know that you haven't but I thought it might be a good occasion also to remind you what I mentioned to you that first day almost two weeks ago, now that you have heard quite a little about this case in fact, we are going very fast, to remind you what I told you then: don't discuss the case among yourselves until the trial is over. You remember I told you that. So please don't do it. This is so important because you must not form any opinion one way or the other, of course, until all the evidence is in, until you have heard everything and you have heard my charge as to what the law is. So I just thought I like to do that every once in a while. I thought I would mention it to you . . ." (Tr. 1195-96)

F.2d at 848-49; see *Government of Virgin Islands* v. *Gereau*, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, — U.S. —, 44 U.S.L.W. 3472 (Feb. 23, 1976); *United States* v. *Klee*, 494 F.2d 394, 396 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974); *United States* v. *Flynn*, *supra* 216 at 372; *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

## POINT VI

### Iarossi's indictment was not barred by the statute of limitations.

Iarossi claims that the District Court committed reversible error in denying his motion for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure on the ground that the date of the filing of the superseding indictment on which he was tried, August 4, 1975, exceeded the five-year statute of limitations, 18 U.S.C. §3282, since he withdrew from the conspiracy prior to August 4, 1970. As evidence of this withdrawal, Iarossi points to Manfredonia's testimony that he and Iarossi ceased dealing in heroin after February or March, 1970 and claims that "Government counsel conceded that there was no evidence of further participation by Iarossi following his incarceration of April 22, 1970." (Br. 9).* Iarossi, in addition, contends that "[t]he court erroneously declined to charge the jury with respect to the statute of limitations defense or to permit counsel to argue the issue to the jury." (Br. 15). This argument lacks merit for two reasons: First, Iarossi did not meet his burden of demonstrating his withdrawal from the conspiracy more than five years prior to indictment; second, the indictment

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* No proof of Iarossi's incarceration was ever presented to the jury.

on which he was tried related back to an earlier, superseded indictment filed well before any conceivable running of the period.

## A. Iarossi did not demonstrate his withdrawal from the conspiracy prior to August 4, 1970.

It is an established principle of law that with respect to the crime of conspiracy the statute of limitations does not begin to run until the last overt act which is alleged and proved takes place. *Grunewald* v. *United States*, 353 U.S. 391, 396-97 (1957); *Brown* v. *Elliott*, 225 U.S. 392, 401 (1912); *United States* v. *Kane*, 243 F. Supp. 746, 748-49 (S.D.N.Y. 1965); *United States* v. *Albanese*, 123 F. Supp. 732, 734 (S.D.N.Y. 1954) *aff'd*, 224 F.2d 879 (2d Cir.), *cert. denied*, 350 U.S. 845 (1955). The last overt act charged in the indictment and proven at trial occurred on February 6, 1973, when Graziano Rizzo and Renato Croce possessed one pound of heroin. If a conspirator withdraws from the conspiracy, the statute of limitations begins to run at the point of withdrawal without regard to when the last overt act of the conspiracy occurred. *United States* v. *Borelli*, 336 F.2d 376, 389 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). This Court has cautioned, however, that "[m]ere cessation of activity is not enough to start the running of the statute; there must also be affirmative action, either the making of a clean breast to the authorities . . . or communication of the abandonment in a manner reasonably calculated to reach co-conspirators. And the burden of establishing withdrawal lies on the defendant." *United States* v. *Borelli*, *supra*, 336 F.2d at 388; *United States* v. *Schwenoha*, 383 F.2d 395, 396-97 (2d Cir. 1967), *cert. denied*, 390 U.S. 904 (1968).

Iarossi has clearly failed to meet his burden of establishing that he withdrew from the conspiracy. The only

evidence cited by the defendant to support his claim of withdrawal is Manfredonia's testimony about *his* own cessation of heroin dealings after a delivery to Blanchard in February or March of 1970 (Tr. 428-403).

Iarossi's claim that Manfredonia testified that "both went out the business" (Iarossi Br. at 5), is based on a total distortion of the record. At no point in the trial did Manfredonia remotely testify that Iarossi went "out of the business" or that Iarossi stopped dealing in heroin. All Manfredonia did say was that until March 1970, he and Iarossi were partners in the drug business.* This Court's decision in *Borelli* emphasizes that Iarossi cannot establish his burden by the mere proof that he was no longer Manfredonia's partner after March of 1970.

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* Iarossi's trial counsel's cross-examination of Manfredonia, in its entirety, reads as follows:

> Q. [Mr. Zelenko] Mr. Manfredonia, I want to ask you a few questions about Mr. Iarossi. I believe you testified that up to March of 1970 you were partners with him in the drug business, right. A. [Mr. Manfredonia] Yes.
>
> Q. And that in March of 1970, right after a certain transaction with another person up in Baltimore you stopped dealing? A. Yes.
>
> Q. You weren't in the business? A. No.
>
> .Q But you stopped dealing? A. Yes.
>
> Q. And you did not resume dealing till some time in October or November of 1970? A. Yes.
>
> Q. Now when you resumed dealing in October or November of 1970, Mr. Iarossi was no longer your partner, was he? A. No.
>
> .Q He was out of it as far as you were concerned? A. Yes.
>
> Q. And then you took a new partner, Mr. Barone? A. Yes.
>
> * * * * *
>
> Q. When you said you stopped dealing, you meant you stopped dealing in drugs for that period of time? A. Yes.
>
> Q. Right? A. Yes. (Tr. 627-628)

Accordingly, this evidence is insufficient to support a motion of acquittal or to raise a question for the jury, *United States* v. *Schwenoha*, *supra*, 383 F.2d a 396-97. Moreover, "[n]either authority nor reason would suggest that imprisonment necessarily shows a withdrawal . . ." *United States* v. *Borelli*, *supra*, 336 F.2d at 389. See also *United States* v. *Agueci*, 310 F.2d 817, 839 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). This is particularly true since Iarossi did not choose to put in evidence the fact of his imprisonment in April, 1970, and further since the continued narcotics activity between Graziano Rizzo and Clark was the direct result of Iarossi's introduction shortly before his imprisonment. It follows that Iarossi did not remotely rest his burden of demonstrating his withdrawal from the conspiracy—indeed, he neither introduced nor elicited any evidence on that issue at all.

**B) The filing of an earlier indictment tolled the statute of limitations.**

Even assuming arguendo that Iarossi demonstrated his withdrawal from the conspiracy at the time of his April 22, 1970, imprisonment, it is an established rule of law that the filing of an indictment tolls the statute of limitations on the charges embraced within the indictment. *United States* v. *Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968); *United States* v. *Wilsey*, 458 F.2d 11, 12 (9th Cir. 1972); *Powell* v. *United States*, 352 F.2d 705, 707 n. 5 (D.C. Cir. 1965). A superseding indictment containing substantially the same charge as the superseded indictment has no effect on the initial tolling of the statute of limitations. *United States* v. *Wilsey*, *supra*; *United States* v. *Garcia*, 412 F.2d 999, 1000-01 (10th Cir. 1969); *United States* v. *Strewl*,

99 F.2d 474 (2d Cir. 1938), *cert. denied*, 306 U.S. 638 (1939).* In the instant case Iarossi was charged with the same conspiracy in the superseding indictment that he was charged with in the superseded indictment, 75 Cr. 170, filed on February 21, 1975. The only differences between the two indictments were the inclusion of additional defendants other than Iarossi. In *Strewl*, *supra*, Judge Learned Hand upheld the validity of a superseding indictment filed after the statute of limitations had lapsed on the ground that the charges in the original indictment were identical to those in the superseded indictment except for the addition of several defendants. Judge Hand held that although the first indictment was not quashed or dismissed, the new indictment was valid since the charge:

> "did not affect Strewl's 'substantial rights' in the slightest degree: it was the merest formality whether the proceedings should be carried on under one document or the other, or on which paper the formal entries should be made." 99 F.2d at 477.

We submit that this rule—that the statute of limitations is satisfied by the filing of an indictment, even though a

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* In *United States* v. *Moskowitz*, 356 F. Supp. 331 (E.D.N.Y. 1973), cited by the defendant, the Court held that a superseding indictment was barred by the statute of limitations because it expanded the charges in the original indictment. To the extent that language in *Moskowitz* implies that a superseding indictment would be invalid under the circumstances of the present case, we submit that it was wrongly decided.

*United States* v. *Alfonso-Perez*, 535 F.2d 1362 (2d Cir. 1976), cited by Iarossi, strongly implies that the date of the first indictment tolls the statute of limitations. Without explicitly indicating whether the case was tried on a superseding indictment, the Court stated that "the original indictment in this case was returned on December 12, 1974" and then goes on to state that the defendant "could not lawfully have been convicted for an offense which occurred before December 12, 1969." *Id.* at 1364.

defendant is actually tried for those charges on a different document—is fully consonant with the policies underlying the statute of limitations of protecting an individual "from having to defend [himself] against charges when the basic facts may have been obscured by the passage of time." *Toussie* v. *United States*, 397 U.S. 112, 114 (1970).

Since the only plausible date on which Iarossi might have withdrawn from the conspiracy was when he was incarcerated on April 22, 1970, four years and 10 months before the original indictment, the trial judge was correct in not instructing the jury on the statute of limitations.* This case is thus utterly unlike *United States* v. *Alfonso-Perez*, *supra*, in which there was a possible question for the jury as to when the last overt act occurred. Furthermore, the Court in *Alfonso-Perez*, explicitly noted that failure to charge the statute of limitations issue would not in itself be grounds for reversal. 535 F.2d at 1365.

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* Iarossi claims that he had no notice that the Government intended to rely on the February 21, 1975, filing of the superseded indictment as fixing the date for statute of limitations purposes and that if he had such notice "defense counsel's cross examination of Manfredonia would have probed his hazy memory concerning the final narcotics transaction in about February or March . . . in which he and Iarossi allegedly participated (Iarossi Br. at 11, 12 n.) The argument is specious. During motions for aquittal at the close of the Government's case, Iarossi argued that the date of the filing of the superceding indictment 75 Cr. 772, August 4, 1975, was the operative date for statute of limitations purposes. In response the Government argued that the February 21, 1975 date controlled. (Tr. 1250-1252; 1284-1287; 1306-1307; 1322). However, Iarossi neglects to mention that after these motions, and after Iarossi had notice that the Government relied on the February date, Judge Bonsal permitted the Government to reopen its direct case and recall Manfredonia. Iarossi's counsel then asked one question on cross-examination (Tr. 1328-1329).

## POINT VII

### Venue as to Rizzo on the substantive counts was properly established in the Southern District of New York.

Leonard Rizzo contends that his convictions on the substantive counts, Counts Four and Eleven, must be reversed because the Government failed to prove that he committed the acts charged in those counts in the Southern District of New York, and, therefore, venue was improperly established in this district. His argument is meritless.

Count Four charged Rizzo with the receipt, concealment and facilitation of transportation of one kilogram of heroin in April 1970 in the Southern District of New York, and Count Eleven charged Rizzo with distribution and possession with the intent to distribute of one-half kilogram of heroin in July 1971 in the Southern District of New York. Regarding these counts, Rizzo does not dispute that the Government proved through the testimony of Mary Mobley that she took personal delivery from him of this heroin (Tr. 181-94). He claims, however, that as Mobley testified she took delivery of this heroin from Rizzo at airports outside the Southern District of New York, namely, Kennedy and La Guardia airports, there was no proof that he committed these offenses in the Southern District of New York.

Rizzo's argument ignores the plain fact that although Mobley testified that she received the heroin outside the Southern District of New York, the circumstantial proof overwhelmingly established that he traveled to his meetings with Mobley from the Bronx, New York, which was extensively used by Rizzos in their narcotics enterprise,

and which, of course, is within the Southern District of New York.*

It is well settled that the Government need only prove venue by a preponderance of the evidence. *United States* v. *Leong*, Dkt. No. 76-1001, slip op. 4347, 4353 (2d Cir. June 23, 1976); *United States* v. *Jenkins*, 510 F.2d 495, 498 (2d Cir. 1975); *United States* v. *Powell*, 498 F.2d 890, 891 (9th Cir. 1974), *cert. denied*, 419 U.S. 866 (1975). Viewed by this standard, and in light of the fact that venue can be established by circumstantial evidence, see *United States* v. *Leong*, *supra*, the Government plainly satisfied its burden in this case.**

During the period when Rizzo delivered the heroin to Mobley, both he and his partner in the transactions, his brother Graziano Rizzo (Ju Ju) resided in the Bronx (Tr. 1375-91, 1399-1400). This alone certainly established that Rizzo possessed the heroin, which he later sold to Mobley at the airports, in the Bronx. *United States* v. *Leong*, *supra*, slip op. at 4353-54. Further, the Government established that Rizzo and his brother used the Bronx extensively in their narcotics operation during the conspiratorial period. Manfredonia testified that he purchased heroin in the Bronx from Leonard and his brother, Graziano, on two occasions in early 1971 and 1972 (Tr.

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* The court properly instructed the jury that if they found that the heroin given to Mobley by Rizzo was brought to her from the Bronx, this would be sufficient to convict Rizzo on the substantive counts. (Tr. 1744-45, 1767-68).

** Rizzo's assertion that the court's failure to charge that the Government had to prove venue by a preponderance of the evidence requires reversal is frivolous. The court's failure to give the preponderance instruction clearly left the jury with the understanding that the Government's burden on the venue question was to prove it "beyond a reasonable doubt," as with all elements of the offenses charged. This instruction thus forced the Government to meet a more stringent burden than the law require.

468, 699-702). Manfredonia also sold heroin to Graziano Rizzo in the Bronx around July 1971 (Tr. 457-61). Finally, in February 1973, law enforcement officers seized one pound of heroin from Graziano Rizzo and co-conspirator Renato Croce in the Bronx (Tr. 874-78, 913-24; GX 15). This proof showed that Leonard and his brother ran a well organized narcotics network from the Bronx and justified the finding that they possessed and stored the heroin which they sold to Mobley in the Bronx, and that they travelled from the Bronx to deliver the heroin to Mobley. In *United States* v. *Leong*, *supra*, this Court noted "Leong's residency in Manhattan would be sufficient circumstantial evidence, if not of the receipt of the heroin in the Southern District certainly of his possession of it, in that District." Slip op. at 4354. In view of Rizzo's continued and significant contacts in the Bronx, it follows *a fortiori* that the evidence in this case was sufficient to demonstrate venue.*

Thus the jury properly found that Rizzo concealed, possessed with the intent to distribute and facilitated the transportation of the heroin he sold to Mobley in the Southern District. *See generally, United States* v. *Leong*, *supra* at 4352. See also *United States* v. *Jenkins*, *supra*; *United States* v. *Hadley*, 500 F.2d 302, 305 (8th Cir. 1974); *Cauley* v. *United States*, 355 F.2d 175, 176 (5th Cir.),

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* Rizzo's contention that the Government conceded below that the only proof against him on the substantive counts emanated from Mobley, (Br. at 12), and, therefore, venue could not have been established, is wrong. The places he cites in the record for this assertion do not support him. Indeed, it was consistently the Government's contention below that venue had been established circumstantially independent of Mobley's testimony. (Tr. 1293-95).

*cert. denied*, 384 U.S. 951 (1966); *Holdridge* v. *United States*, 282 F.2d 302, 305 (8th Cir. 1960).*

## POINT VIII

### None of the other claims has merit.

### A) There was no material variance between Count Four and the proof at trial.

Leonard Rizzo claims that Court Four of the indictment, which charged him with receiving, concealing and facilitating the transportation of "approximately" one kilogram of heroin "in or about" April of 1970, was improperly amended by the testimony of Mary Mobley that the transaction took place in August of 1970 and related to an unspecified amount of heroin.

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* Reiterating his venue attack, Rizzo separately contends that the Grand Jury lacked adequate evidence of venue to support its indictment of Rizzo on Counts 4 and 11. (Rizzo Br., Pt. II). The contention not only suffers from the strain of the analysis made above, which revealed the utter lack of merit in Rizzo's claims about the insufficiency of the evidence of venue adduced at trial on these two counts, but it misstates the controlling principle of law enunciated in *Costello* v. *United States*, 350 U.S. 359 (1956), which is cited in Rizzo's brief. Contrary to Rizzo's interpretation, *Costello* established that an indictment valid on its face, as was the indictment here, (Rizzo Br. at 27-28), is not subject to challenge on the ground that the grand jury which returned the indictment lacked sufficient evidence to make the charges contained therein. Furthermore, since venue is not an essential element of the offense charged and need not be charged in the indictment, *Carbo* v. *United States*, 314 F.2d 718, 733 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964), it necessarily follows that evidence of venue need not even be presented to the grand jury. In any event, Judge Bonsal reviewed the grand jury testimony before denying Rizzo's motion below on this ground, thus affording Rizzo far more judicial scrutiny than he was legally entitled to on this issue, and his attack here is patently frivolous.

Mobley testified that she met Graziano Rizzo at the grand opening of Alvin Clark's Pittsburgh restaurant in about the month of June in the summer of 1970 (Tr. 300). She met Leonard Rizzo about two weeks later at the restaurant and a couple of weeks later she picked up heroin from Leonard in New York (Tr. 68-70; 180-184; 306-309).

In order to constitute reversible error any variance between the proof at trial and the indictment must be prejudicial. *United States* v. *Miley, supra*, 513 F.2d at 1207; *United States* v. *Antonelli*, 439 F.2d 1068, 1070 (1st Cir. 1971). In particular, "the true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 82 (1935). Here Leonard Rizzo does not nor could he make any such claim. Rizzo, who testified in his own behalf, denied ever dealing in heroin with Mobley or anyone else, and he offered no defense that in any manner was affected by the differences in dates. Absent any showing of prejudice or claim of surprise, the variance was immaterial and harmless. *United States* v. *D'Anna*, 450 F.2d 1201, 1204 (2d Cir. 1971); *United States* v. *Edelman*, 414 F.2d 539, 542 (2d Cir. 1969), *cert. denied*, 396 U.S. 1053 (1970); *United States* v. *Covington*, 411 F.2d 1087 (4th Cir. 1969); *United States* v. *Mann*, 432 F.2d 53 (5th Cir. 1970).

## B) Iarossi was not sentenced in violation of the Constitution.

Iarossi claims that his sentence as a second narcotics offender under the provisions of Title 21, United States Code, Section 851 is invalid because a 1969 conviction

relied on by the Government in filing the second offender information was committed prior to the enactment of Section 851 on May 1, 1971. Iarossi claims that this violates the constitutional provision against *ex post facto* laws. The argument is specious. The enhanced punishment Iarossi was subjected to was not for the prior offense but for his "repetition of such offenses subsequent to the enactment of the statute." *Cooper* v. *United States*, 114 F. Supp. 464 (S.D.N.Y. 1963). As such, Section 851 is not invalidly retroactive. *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948); *United States* v. *Sierra*, 297 F.2d 531 (2d Cir. 1961), *cert. denied*, 369 U.S. 853 (1962); *Wey Him Fong* v. *United States*, 287 F.2d 525 (9th Cir.), *cert. denied*, 366 U.S. 971 (1961).

### C) Panebianco was not sentenced as a second narcotics offender.

Appellant Panebianco had two prior convictions, both involving violations of Title 18, United States Code, Section 371, one in 1953 and the second in 1962. In each case the object of the conspiracy was the violation of the narcotics laws. The 1953 conviction concerned heroin, and cocaine was involved in the 1962 conviction. The Government filed a second offender information against Panebianco based on the 1962 conviction; however, it was brought to the trial Court's attention at sentence by the Government and defense counsel that there was a question as to whether that conviction, under 18 U.S.C. § 371, was a prior narcotics conviction within the meaning of the statute. Judge Bonsal, who did not state whether he was sentencing Panebianco as a second offender, imposed a sentence of ten years to be followed by a special parole term of six years. We submit that in view of the dispute over the appropriateness of the second offender information, the record indicates that Judge

Bonsal disregarded it and sentenced Panebianco solely on the basis of his extensive criminal record as well as the three narcotics offenses he was found guilty of by the jury (Tr. 1878-1885). Panebianco's assertion that the six year special parole term imposed on Panebianco conclusively established that Judge Bonsal sentenced Panebianco as a second offender is without merit. The appellant Blanchard, against whom no second offender information was filed, was also given a term of imprisonment of ten years and a special parole term of six years (Tr. 1898-1904).* Clearly, then, the ten year sentence was well within the limits Panebianco could have received and in view of his extensive criminal record was proper and given without reliance on the second offender information. This Court has ruled on innumerable occasions that a sentence imposed within statutory limits is not reviewable, see *United States* v. *Velezquez*, 482 F.2d 139, 142 (2d Cir. 1973) (and cases there cited); accord, *Dorszynski* v. *United States*, 418 U.S. 424, 440-41 (1974); *United States* v. *Tucker*, 404 U.S. 443 (1972). The Court has also held that it will not "go behind" reasons stated by the sentencing judge to determine if additional and impermissible matters were considered. *United States* v. *Herndon*, 525 F.2d 208 (2d Cir. 1975); *United States* v. *Hermann*, 524 F.2d 1103 (2d Cir. 1975). Since Pane-

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* Title 21, United States, section 841 (5)(1)(A) provides a mandatory *minimum* of three years parole to follow a custodial sentence; however, the court can impose any special parole term—including life—greater than the minimum. *United States* v. *Rich*, 518 F.2d 980, 987 (8th Cr. 1975).

This Court noted in *United States* v. *Hermann*, 524 F.2d 1103, 1104 (2d Cir. 1975), that similar sentences given to a similarly situated co-defendant "ends the matter" of whether a court considered an improper factor.

bianco's sentence was well within the maximum he could have received as a single offender, it is unreviewable.

## CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York )
County of New York )

JAMES P. LAVIN being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 3rd day of September, 1976 He served 2 copies of the within Brief and 1 copy of the within notice of motions and affidavit by placing the same in a properly postpaid franked envelope addressed:

(See attached list)

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse Annex, One St. Andrew's Plaza, Foley Square, Borough of Manhattan, City of New York.

James P. Lavin
JAMES P. LAVIN

Sworn to before me this
3rd day of September, 1976
Alma Hanson

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